No. 77-1798

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

PORTER COUNTY CHAPTER OF THE IZAAK WALTON LEAGUE OF AMERICA, INC.; SAVE THE DUNES COUNCIL, INC.; ANN SIMS and HERBERT P. READ, *Petitioners*,

v.

DOUGLAS COSTLE, Administrator, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT NORTHERN INDIANA PUBLIC SERVICE COMPANY IN OPPOSITION

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OPINIONS BELOW

The opinions of the Court of Appeals for the Seventh Circuit are reported at 571 F.2d 359, and are set out in the Appendix at pages 1-20.

JURISDICTION

The judgment of the Court of Appeals was entered on January 30, 1978. A petition for rehearing was de-

nied on March 20, 1978 (App. p. 21). The petition for certiorari was filed on June 19, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Do the provisions of Public Law 89-298, concerning Burns Waterway Harbor, impose limits on the Administrator of the Environmental Protection Agency in issuing a permit under the Federal Water Pollution Control Act?

STATUTES INVOLVED

The relevant provisions of Public Law 89-298 of October 27, 1965 (79 Stat. 1073) and of the Federal Water Pollution Control Act of 1972 (33 U.S.C. Secs. 1251 *et seq.*) are set forth in the petition Appendix at pages 13a-14a and 1a-12a, respectively.

STATEMENT

On October 31, 1974 the Regional Office of the United States Environmental Protection Agency (EPA) issued, pursuant to Section 402 of the Federal Water Pollution Control Act, 33 U.S.C. § 1342 (P. App. pp. 4a-11a), a National Pollutant Discharge Elimination System (NPDES) permit to respondent Northern Indiana Public Service Company (NIPSCO), for its coal-fired generating plant adjacent to Burns Harbor, Indiana, subject to certain special conditions and effluent limitations. Pursuant to 40 C.F.R. §§ 125.36 *et seq.*, NIPSCO filed a request for an adjudicatory hearing, which was granted, and petitioners herein were admitted as parties.

At a prehearing conference, the present petitioners raised, as a legal issue, the question now involved in

the petition for certiorari—whether Public Law 89-298 had any applicability in connection with the permit application.

Public Law 89-298, an omnibus public works measure, contains in Section 301, with respect to the Burns Waterway Harbor, the following reference to pollution:

> ". . . The State of Indiana shall furnish assurance satisfactory to the Secretary of the Army that water and air pollution sources will be controlled to the maximum extent feasible in order to minimize any adverse effects on public recreational areas in the general vicinity of the Harbor. . . ."

Petitioners asserted (a) that the words "to the maximum extent feasible" set more stringent requirements than the "best practicable control technology currently available" mandated by Section 301(b)(1)(A) of the Water Pollution Control Act [1] and (b) that the Administrator was required by the provision of Section 301 (b)(1)(C), which requires the applicant for a permit to meet "any more stringent limitations, including those necessary to meet water quality standards, treatment standards, or schedules of compliance" established by any other State or Federal law, to apply those requirements in ruling on NIPSCO's application for a permit.

Pursuant to 40 C.F.R. Sec. 125.36(m), the question was certified to the General Counsel of EPA, who ruled that Public Law 89-298 had no application (App. pp. 22-25). On August 10, 1976 the Administrator declined

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[1] By 1983, Section 301b)(2)(A), the standard will be "the best available technology economically achievable."

to review the General Counsel's decision (App. pp. 36-39).

On October 7, 1976 the Regional Administrator issued the initial decision authorizing the issuance of an amended permit to NIPSCO, and approved a stipulation entered into by the parties which resolved factual issues and preserved the legal question pertaining to Public Law 89-298. Pursuant to 40 C.F.R. 125.36(1)(4), that decision became the decision of the agency ten days later, and on December 7, 1976 the permit (set out in the Appendix at pages 40-56) was formally issued. The petition to review that action was filed in the court below March 7, 1976.[2]

The court below, after a full review of the legislative history of the Burns Waterway Harbor legislation, concluded that Public Law 89-298 "does not contain a specific standard and does not give the Secretary of the Army authority to promulgate precise standards" (App. p. 12), but only "voices a broadly stated objective," which gives the Secretary of the Army authority to exercise his discretion in obtaining assurances from Indiana of "maximum feasible pollution control in Burns Harbor" (*ibid.*). These assurances, the court pointed out, have been received and hence, "the Secretary's acceptance of Indiana's submission is the end of the matter as regards the applicability of Public Law 89-298" (App. pp. 13-14). The court went on to say that even were Public Law 89-298 to be applied, it would not change the result, since petitioners "have made no showing" that any requirement based on the

[2] Petitioners had earlier filed a petition to review the Administrator's decision of August 10, 1976. The two petitions were consolidated for hearing and decision by the court below.

public law would be more stringent than the "best practical control technology currently available" (App. pp. 16-17). Chief Judge Fairchild, dissenting, would have remanded the matter to the EPA to determine whether the public law standard is indeed more stringent (App. pp. 19-20).

ARGUMENT

As is apparent from the Statement, *supra,* the question involved in the present case is essentially unique to the permit in issue. There is no conflict of decisions, nor can the issue be fairly characterized as an important question of federal law that should be settled by a decision of this Court.

Indeed, petitioners appear to avoid even a challenge to the conclusion of the majority below that Public Law 89-298, as shown by both its language and its legislative history, was a directive to the Secretary of the Army which the Secretary duly carried out, and has no application to the responsibilities of the Administrator. Instead, petitioners direct their arguments to a dictum, appearing at the conclusion of the majority opinion (App. pp. 10-11) that even were Public Law 89-298 applicable, petitioners had failed to show that any requirements based on it would be more stringent.

The dictum accurately reflects the facts, and can in no way support petitioners' assertion that the court has so far departed from the accepted course of judicial proceedings as to warrant review by this Court. More importantly, that challenge does not apply in any way to the *decision* of the court below, that the Administrator had correctly decided that Public Law 89-298 has no application to NIPSCO's application.

There is no need to repeat here the detailed review in the opinion below of both the circumstances surrounding the "port-park" controversy concerning Indiana's Lake Michigan shoreline, and the legislative history of Public Law 89-298. Suffice it to say that both the text of the public law and the record made during the course of its enactment amply support the conclusion of the majority below (App. p. 15):

> "It gave a directive to the Secretary of the Army, not to the Administrator of EPA. The Act left the matter to the Secretary's discretion; it did not authorize him, and certainly not the Administrator, to promulgate standards. He was to receive assurances of pollution control prior to the construction of the harbor and that was to be the end of the matter. He was not authorized to demand assurances indefinitely. In our opinion, it would be judicial legislation to find that Congressional policy requires EPA to act in a situation and in a manner clearly not contemplated by the language of Public Law 89-298 or its legislative history."

It can be added, as the court below also pointed out (App. pp. 12-13), that the words of Public Law 89-298 are a "broadly stated objective," and neither contain a specific standard nor authorize the Secretary of the Army to promulgate precise standards. Without further definition, its words establish no enforceable requirement. Section 301(b)(1)(C), which refers to "water quality standards, treatment standards, or schedules of compliance" is simply not applicable.

CONCLUSION

The decision below is correct. It involves no conflict with the decision of any other court, and no question of general importance. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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